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March 8, 2002

VIA ELECTRONIC FILING

Marjorie Reed Greene
Associate Bureau Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **City Signal Communications, Inc.**
Written *Ex Parte* - CS Docket No. 00-253

Dear Ms. Greene:

Pursuant to Section 1.1206(b) of the Commission's Rules, City Signal Communications, Inc. ("City Signal" or "Company") is submitting this written *ex parte* in response to the February 22, 2002 letter ("Letter") filed by the attorney for the City of Cleveland Heights, Ohio ("City"). City Signal submits this response to address the City's mischaracterization of the section 253 issues in this proceeding.

Significantly, in its Letter the City does not refute City Signal's contention that the City acted in a discriminatory and non-competitively neutral manner by requiring that City Signal place its facilities underground while allowing the ILEC to maintain its facilities above ground on utility poles. The vastly greater capital cost of underground versus above ground installation, which City Signal already has documented in this proceeding, coupled with the fact that the incumbent providers with whom City Signal would be in competition in the City do not bear that handicap, have had the effect of prohibiting City Signal's entry into the Cleveland Heights market. Instead of addressing this clear violation of section 253, the City attempts to create a diversion by focusing on the terms under which it "offered" City Signal the opportunity to access the City's rights-of-way. It is evident from the City's letter that it misses the point of the section 253 violations at issue in this proceeding.

The FCC has recognized in prior cases that requiring a competing provider to use higher cost rights-of-way (such as underground rights-of-way), when another carrier has been allowed to use lower cost rights-of-way (such as aerial rights-of-way), is inherently non-competitively neutral and imposes a barrier to entry in violation of section 253. In a matter decided by the FCC in 1999,

applying section 253 to the State of Minnesota's proposal to grant exclusive use of freeway rights-of-way in the State to a single developer, the Commission concluded that the State's proposal did not pass muster under section 253, in part because those facilities-based providers that were allowed to use the freeway rights-of-way would enjoy lower market entry costs than providers forced to use other, alternative rights-of-way.[1] The Commission said: "We are very concerned that giving the Developer exclusive physical access to rights-of-way that are inherently less costly to use has the potential to prevent facilities-based entry by certain other carriers that cannot use these rights-of-way."[2] Noting that some commenters in the proceeding had claimed that the cost differential between using freeway rights-of-way and other, alternative rights-of-way "is substantial enough to make it infeasible for a competitor to use alternative rights-of-way to provide facilities-based services in competition with the Developer or entities using Developer's services," the Commission agreed, stating: "Evidence on the record indicates that the cost of using the alternative rights-of-way is not competitive with using [sic] of the freeway rights-of-way, to serve communities along the freeway's route."[3] Allowing the Developer and entities using the Developer's service to make use of the less costly freeway rights-of-way, while imposing on other, competing carriers the higher cost of using alternative rights-of-way, the FCC held, "would be inconsistent with section 253(a)."[4]

Here, the City has sought to impose just such an unlawful cost differential on City Signal. The City demanded, contrary to City Signal's request, that the Company install its network underground in certain portions of the City. Under the City's required terms, City Signal would pay the City for the entire cost of installing two 4" conduits, of which City Signal would use ¼ of the available conduit capacity. City Signal would have no ownership rights in the underground conduit, construction of which the City is requiring the Company to fund. Nor would City Signal have any assurances of reimbursement over a reasonable period of time for the substantial capital outlay that the Company would be required to pay to the City for the excess conduit construction.[5]

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1 In the Matter of the Petition of the State Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way, *Memorandum Opinion and Order*, 14 FCC Rcd. 21,697 (1999) ("*Minnesota Order*") (finding that an exclusive agreement between the State and a developer for construction of fiber optic wholesale capacity was subject to section 253).

2 *Id.* at ¶22.

3 *Id.* at ¶23.

4 *Id.* at ¶22.

5 The assumed cost to City Signal of construction of this excess conduit, to be used by City Signal's competitors, is stated in the City's proposed form of agreement attached to the City's letter, as $270,713.00. This amount would be reimbursed to City Signal only over time and only to the extent that the excess conduit eventually became fully occupied, which might never occur. *See* Letter from John Foley, Esq., Walter & Haverfield, LLP, to Marjorie Reed Greene, Associate Bureau Chief, Cable Services Bureau, FCC, dated Feb. 22, 2002, Draft Right-of-Way-

The City's requirement that City Signal place its facilities underground would impose unnecessary and exorbitant up-front costs on City Signal that were not imposed on its competitors, obligating City Signal to pay the City $360,950.00 for its conduit construction.[6] The City attempts to avoid responsibility for having imposed this significant and unlawful barrier to market entry by characterizing the situation as one in which City Signal voluntarily made a decision not to pay the necessary costs of construction. But, in fact, the costs that the City sought to impose were not necessary. The City could have permitted City Signal to place its facilities on poles, as earlier entrants had done, which would have allowed City Signal to enter the market at vastly lower costs,[7] thereby enabling the Company to compete on a competitively neutral and non-discriminatory basis, as the Telecommunications Act requires.

Furthermore, while the unreasonable economic conditions imposed by the City are one reason for City Signal's decision to build around the City, the City's simplified view completely disregards the fact that City Signal for more than two years attempted to negotiate a viable rights-of-way access agreement with the City, to no avail. Ultimately, City Signal could no longer allow its entire network in the area to be held up while it waited and hoped that the City would change its position. The record in this proceeding provides substantial evidence on the question of the City's delay, and need not be repeated here.

The City's effort to characterize its treatment of City Signal in a positive light by listing the demands that it did not impose on the Company is misplaced. The majority of those demands would have been prohibited by state or federal law anyway,[8] and thus, are irrelevant to the City's other demands at issue here.[9] The City's contention that it would not have imposed a franchise fee on City Signal is purely gratuitous; Ohio law prohibits municipalities from imposing such fees on

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Use Agreement at 3.

6 *See* John Foley Letter, Draft Agreement at 2.

7 *See* Affidavit of Charles Koslosky in support of the Reply Comments of City Signal Communications, Inc., dated February 14, 2001.

8 *See City of Auburn et al v. Qwest Corporation*, 247 F.3d 966 (9th Cir. Apr. 24, 2001), *opin. amended*, 260 F.3d 1160 (9th Cir. Jul. 10, 2001), *cert. denied*, __ S.Ct. __, 2002 WL 13258, 70 U.S.L.W. 3281 (Jan. 7, 2002) (finding that the following requirements were not proper management of the public right-of-way under section 253(c): (1) financial, technical and legal qualifications; (2) description of services; and (3) "most favored community" status). Moreover, the City does not have the legal authority to regulate a telecommunications company's services or rates. *City of Cambridge v. Public Utilities Commission*, 159 Ohio St. 88, 111 N.E.2d 1 (1953).

9 It is ridiculous for the City to lament the costs it has incurred in connection with City Signal's rights-of-way access request given the substantial costs incurred by the Company as a result of the City's section 253 violations. The City has no one but itself to blame for these costs.

telecommunications companies. Chapter 4939 of the Ohio Code provides that municipalities cannot impose "a tax, fee, or charge, or require any non-monetary compensation" on public utilities for the right "to use or occupy the public right of way." Ohio Rev. Code Ann. § 4939.03(A) (Anderson 2000).

Perhaps recognizing the weakness of its position, the City in its Letter attempts to raise a smokescreen regarding the nature of the services to be provided by City Signal. The City argues that as a "carrier's carrier" City Signal is not a telecommunications carrier and lacks proper standing to maintain its section 253 claim. The Commission has already addressed this issue in other section 253 proceedings. The Commission has specifically held that in determining whether a statute, regulation or legal requirement is subject to 253, it is the "[local requirement's] effect on the provision of telecommunications services that is critical, not whether the [local requirement] could be characterized as dealing with infrastructure development," and that a restriction on the deployment of telecommunications infrastructure along public rights-of-way may have the "effect of prohibiting certain entities from providing telecommunications services."[10] Such a restriction is subject to section 253 regardless of whether the infrastructure provider is providing a telecommunications service. *Id.* Moreover, while City Signal's initial business plan contemplates making its facilities available for use by other competitive telecommunications carriers, City Signal is certificated by the Public Utilities Commission of Ohio to provide local exchange telecommunications services in the state.[11] Consistent with its CLEC status, City Signal has obtained an interconnection agreement with Ameritech, which will enable it to provide lit fiber or dial tone services in the future. As a consequence of the City's unlawful actions, other carriers in addition to City Signal (e.g., City Signal's potential customers) are effectively prohibited from providing telecommunications services in Cleveland Heights. Thus, the City's demands on City Signal with respect to its public rights-of-way are clearly subject to section 253.

City Signal requests that the Commission take prompt action to remedy the section 253 violations at issue in this proceeding. Strong Commission action is essential to stem the unlawful actions of the localities in these proceedings, who are abusing their rights-of-way authority by imposing inordinate delays on new entrants who refuse to capitulate to terms that are discriminatory and not competitively neutral. These barriers deprive new entrants, such as City Signal, of the opportunity to compete on a level playing field with existing providers in a market.

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[10] *Minnesota Order*, *supra* note 1, ¶¶ 12-15 (finding that an exclusive agreement between the State and a developer for construction of fiber optic wholesale capacity was subject to section 253).

[11] *See* Order in Case No. 99-1167-TP-ACE (effective Feb. 24, 2000).

Please feel free to contact us if you have any questions or need additional information regarding City Signal's petitions.

Respectfully submitted,

/s/ Kathy Cooper

Jeffrey M. Karp
Kathy L. Cooper

Counsel for City Signal Communications, Inc.

cc: John Gibbon, Esq. Walter & Haverfield
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